

224.60-140 Petroleum storage tank environmental assurance fund -- Claims for reimbursement.

- (1) There is hereby created the petroleum storage tank environmental assurance fund. The fund shall consist of a financial responsibility account and a petroleum storage tank account. Each account shall be maintained as a separate and distinct interest-bearing account. Interest credited to an account shall be retained in that account. All of the following amounts shall be deposited in the fund:
 - (a) Four-tenths of one cent (\$0.004) from the one and four-tenths cent (\$0.014) paid on each gallon of gasoline and special fuels received in this state pursuant to KRS 224.60-145 to the financial responsibility account;
 - (b) One cent (\$0.01) from the one and four-tenths cent (\$0.014) paid on each gallon of gasoline and special fuels received in this state pursuant to KRS 224.60-145 to the petroleum storage tank account;
 - (c) Money appropriated by the General Assembly for deposit in each account;
 - (d) Any money recovered by the fund pursuant to this section shall be deposited in the appropriate account; and
 - (e) Any money collected in the form of penalties levied pursuant to KRS 224.60-155 shall be deposited to the appropriate account.
- (2) Money in the fund, financial responsibility account, and the petroleum storage tank account shall be used by the division for the following purposes:
 - (a) To reimburse petroleum storage tank owners or operators for the costs, expenses, and other obligations incurred for corrective action required by the cabinet to be undertaken as the result of a release into the environment from a petroleum storage tank. Reimbursement shall be limited to only those costs, expenses, and other obligations incurred to comply with corrective action requirements established in law or administrative regulation by the cabinet. Additional costs related to compliance with a local program operating under KRS 224.60-105(4) shall be neither reimbursable by the fund nor imposed on the owner or operator. Reimbursement shall not include the costs related to the removal, or actions incidental to the removal, of a tank system except as authorized under KRS 224.60-130(1)(j);
 - (b) For payment of or reimbursement for third-party claims for bodily injury and property damage, related to a facility eligible for participation in the financial responsibility account, which are asserted against a petroleum storage tank owner or operator as a result of a release into the environment from a petroleum storage tank;
 - (c) To pay the reasonable, prorated costs incurred by the division in administering each account; and
 - (d) The cost to operate the small operators' assistance account pursuant to KRS 224.60-130(1)(d), the small operators' tank removal account pursuant to KRS 224.60-130(1)(j), to perform or contract for the performance of financial audits conducted under KRS 224.60-130(1)(k), and to employ sufficient

inspectors to carry out the provisions of KRS 224.60-130 and to set forth their duties. These costs shall be prorated to each account.

- (3) The use of the fund shall not exceed one million dollars (\$1,000,000) per occurrence for corrective action and one million dollars (\$1,000,000) per occurrence for compensating third parties for bodily injury and property damage.
- (4) Money in the fund may be used by the cabinet for costs incurred by the cabinet for corrective action taken pursuant to KRS 224.60-135(2) and (4).
- (5) The fund shall be used to guarantee payment of reasonable costs and expenses to a contractor performing corrective action under contract with a petroleum storage tank owner or operator subject to entry level amounts payable by the petroleum storage tank owner or operator. Money in the fund shall be obligated to secure the guarantee.
- (6) A petroleum storage tank owner or operator may apply to the division for reimbursement from the fund of costs to perform corrective action, except that the petroleum storage tank owner or operator shall be responsible for and shall not be reimbursed for an amount equal to the entry level into the fund as set pursuant to administrative regulation of the division.
- (7) The division or its designated agent shall issue all decisions made on claims filed pursuant to this section in writing, with notification to all appropriate parties, within ninety (90) days after submission of the claim, unless all parties to the claim agree in writing to an extension of time. The division shall by phone or facsimile transmission immediately notify the claim applicant and its consultant, if applicable, when the claim is determined to be deficient. The notification shall provide sufficient information to allow the applicant and its consultant, if applicable, to begin to correct the deficiency. The division shall then notify the applicant and its consultant, if applicable, by certified mail of the deficiency. The notice shall indicate how many days remain in the ninety (90) day review period from the time of mailing. The review period shall be tolled pending submittal of information responding to the deficiency, but not to exceed thirty (30) days. When the division receives information that corrects the deficiency, or at the end of the thirty (30) day period, the division shall complete the review of the claim within the time remaining in the ninety (90) day review period. Nothing in this section shall be construed as preventing the fund from making partial reimbursement as appropriate.
- (8) Except as provided in subsection (9), any costs incurred and payable from the fund for corrective action taken pursuant to KRS 224.60-135(2) shall be recovered by the division from the petroleum storage tank owner or operator which released the petroleum or petroleum products into the environment.
- (9) The liability of a petroleum storage tank owner or operator subject to a cost recovery under this section shall not exceed an amount equal to the entry level into the fund, the division's cost incurred in the cost recovery, and any penalties applied in accordance with KRS 224.60-155. This amount shall include any expenditures made by the petroleum storage tank owner or operator for the release into the environment from the petroleum storage tank that is the subject of the cost of recovery.

- (10) The amount of costs determined pursuant to subsections (8) and (19) of this section shall be recoverable in a civil action. This subsection does not deprive a party of any defense the party may have.
- (11) Money recovered by the division pursuant to this section shall be deposited in the appropriate account.
- (12) Upon motion and sufficient showing by any party, the court shall join to the action any person who may be liable for costs or expenditures recoverable pursuant to this section.
- (13)
 - (a) Any party found liable for any costs or expenditures recoverable under this section who establishes that only a portion of those costs or expenditures are attributable to their actions, shall pay only for that portion.
 - (b) If the trier of fact finds the evidence insufficient to establish each party's portion of costs or expenditures pursuant to subsection (12) of this section, the court shall apportion those costs or expenditures, to the extent practicable according to equitable principles among the defendants.
 - (c) The appropriate account shall pay any portion of the judgment in excess of the aggregate amount of costs or expenditures apportioned under paragraphs (a) and (b) of this subsection.
- (14)
 - (a) No indemnification, hold harmless, conveyance, or similar agreement shall be effective to transfer any liability for costs recoverable under this section. This subsection shall not bar any agreement to insure, hold harmless, or indemnify a party to the agreement for any costs under KRS 224.60-105 to 224.60-160.
 - (b) The entry of judgment against any party to the action shall not bar any future action by the fund against any other person who is later discovered to be potentially liable for costs paid from the fund.
 - (c) Payment of any claim by the fund pursuant to KRS 224.60-105 to 224.60-160 shall be subject to the state acquiring by subrogation the rights of the claimant to recover those costs of corrective action for which it has compensated the claimant from the person responsible or liable for the release.
- (15) This section shall not be construed as authorizing recovery for costs of corrective action resulting from any release authorized or permitted pursuant to state or federal law.
- (16) The cabinet shall attempt, to the maximum extent practicable, to secure or obtain funds that may be available for corrective actions under federal laws. However, nothing in this subsection shall prevent the cabinet from expending any funds available under KRS 224.60-105 to 224.60-160 if such federal funds are determined to be unavailable.
- (17) The fund shall not be used for corrective action, reimbursement, or third-party liability resulting from releases from petroleum storage tanks used exclusively for storage of fuel used in the operation of a commercial ship or vessel oil tanks used exclusively for storage of fuel used for the purposes of powering locomotives.
- (18)
 - (a) Any person filing a claim for reimbursement from the division shall, prior to filing the claim for reimbursement, ensure full payment of the claims of all

vendors and subcontractors who have performed work or supplied materials related to corrective action at an underground storage tank facility, where labor or materials supplied by a vendor or subcontractor form a basis for at least part of the claim for reimbursement.

- (b) A vendor or subcontractor may waive, in writing, his right to receive full payment before the person files the claim for reimbursement. Any vendor or subcontractor who waives, in writing, his right to full payment shall also waive, in writing, his right to take legal recourse against the division and the underground storage tank facility owner or operator for nonpayment from a prime contractor for work performed or materials supplied to the prime contractor during corrective action at an underground storage tank facility. Any vendor or subcontractor who waives, in writing, his right to full payment prior to the filing of the claim for reimbursement shall acknowledge in the written waiver that his, his heirs', successors', and assigns' sole recourse for the nonpayment of work performed or materials supplied to a prime contractor during corrective action at an underground storage tank facility is to proceed against the prime contractor for whom he performed the work or supplied materials. Any vendor or subcontractor who waives, in writing, his right to full payment prior to the filing of the claim for reimbursement shall release and discharge any liens filed as a result of work performed or materials provided at the underground storage tank facility. Subcontractor and vendor waivers must be made on standard forms furnished by the division. Their signatures must be notarized.
- (c) Unless the provisions of paragraph (b) of this subsection apply, any person filing a claim for reimbursement from the division shall certify, by affidavit, on standard forms furnished by the division, that all vendors and subcontractors who have performed work or supplied materials related to corrective action at an underground storage tank facility, where labor and materials supplied by a vendor or subcontractor form a basis for at least part of the claim for reimbursement, have been paid in full as of the date of submission of the claim for reimbursement. A single affidavit may be made for each claim for reimbursement, provided, however, that the representations made in the affidavit shall be applied to each vendor or subcontractor individually, and, where false, shall be treated, as to each vendor or subcontractor, as a separate violation for the purpose of applying any criminal statute.
- (d) Any person with responsibility for administering the division who believes, or has information, that an affidavit submitted pursuant to this subsection contains false or misleading information, or any person with responsibility for administering the division who believes or has information that an application for financial assistance or a claim for reimbursement contains false or misleading information, shall provide that information to the Commonwealth's attorney whose jurisdiction includes the county where the majority of the subject underground storage tank facility is located. That person may additionally provide the information to any other interested

prosecutor with jurisdiction to prosecute crimes pertaining to an application for financial assistance or the claim for reimbursement.

- (19) Any person who knowingly makes a false statement, representation, or certification in an application for reimbursement from the fund, or in any supporting documentation attached thereto, shall be responsible for and shall not be reimbursed for any amounts incurred based upon the false statement, representation, or certification. Any costs incurred and paid from the fund which are based on a false statement, representation, or certification in an application for reimbursement from the fund, or in any supporting documentation attached thereto, shall be recovered by the fund administrators from the person who asserted the false statement, representation, or certification.

Effective: June 20, 2005

History: Amended 2005 Ky. Acts ch. 123, sec. 27, effective June 20, 2005. -- Amended 2002 Ky. Acts ch. 361, sec. 4, effective July 15, 2002. -- Amended 2000 Ky. Acts ch. 409, sec. 1, effective July 14, 2000. -- Amended 1998 Ky. Acts ch. 284, sec. 6, effective July 15, 1998; and ch. 498, sec. 5, effective July 15, 1998. -- Amended 1996 Ky. Acts ch. 295, sec. 3, effective July 15, 1996. -- Amended 1992 Ky. Acts ch. 450, sec. 4, effective April 13, 1992. -- Created 1990 Ky. Acts ch. 370, sec. 8, effective April 9, 1990.

Formerly codified as KRS 224.821.

2004-2006 Budget Reference. See State/Executive Branch Budget, 2005 Ky. Acts ch. 173, pt. V, E.5., at 3154; and State/Executive Branch Budget Memorandum, 2005 Ky. Acts ch. 170, at 1579 (Final Budget Memorandum, at 8).